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No. 588.10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

ALLIED STORES OF OHIO, INC.,

Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF
OHIO,

Appellee.

BRIEF OPPOSING MOTION TO DISMISS

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OHIO,**

Appellee.

BRIEF OPPOSING MOTION TO DISMISS

Appellant desires first to clarify a point possibly not made apparent in its jurisdictional statement. Under the Ohio Supreme Court's holding in *The B. F. Goodrich Co. v. Peck*, 161 Ohio St., 202, 118 N. E. 2d, 525, foreign corporations are "nonresidents". We quote from the court's syllabus:

"1. In the absence of the expression of a contrary legislative intention, a corporation incorporated under the laws of a foreign state will generally be included by the use in a statute of the word 'nonresident'."

Turning to the Tax Commissioner's motion to dismiss, he contends that the discrimination appearing in Section 5701.08, Revised Code of Ohio, is reasonable because, as he puts it on page 4 of his motion:

"No doubt the basis for this legislative pronouncement was the conviction that property which was not

used in business in the state in any real sense should not be taxed, and the knowledge that such property of a nonresident was ordinarily neither a product of this state nor was it destined to be committed to the commerce of this state."

Appellant does not concede the validity of a statutory presumption that corporations do not ordinarily sell or manufacture products outside the state of their incorporation, and the Ohio Supreme Court did not uphold the statute on that ground. Just the contrary, it held that even though the statute be unconstitutional and in violation of equal protection, it must nevertheless be sustained. Consequently, residents continue to be taxed on storages and nonresidents continue to be excepted from taxation irrespective of the statute's constitutionality.

The commissioner also contends that the decision was based upon an adequate non-federal ground. The effect of the decision was to deny appellant's claim of unequal protection by holding that if the statute were unconstitutional, residents would still be liable for the tax, and at any rate, they could not be relieved of the tax, even if discriminated against, because that would run counter to the legislature's intent. As pointed out in appellant's jurisdictional statement, this is no decision at all, *Lawrence v. State Tax Commissioner*, 286 U. S., 276, 76 L. Ed., 1102, 52 S. Ct., 556.

Nor is there any question of separation of powers. If a statute is unconstitutional, the courts have jurisdiction so to hold.

Respectfully submitted,

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